Office-Supreme Court, U.S.
FILED
JUN 19 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1734

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KATHY JOHNSON,

Petitioner,

VS.

THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY, JOHN W. OSWALD, individually and as President of the Pennsylvania State University, M. LEE UPCRAFT, individually and as Director of Residential Life Programs of the Pennsylvania State University,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER KATHY JOHNSON

HENRY T. REATH
JAMES T. MOUGHAN
JUDITH N. RENZULLI

DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102
(215) 854-6347/8806

Attorneys for Petitioner

June 18, 1985

TABLE OF CONTENTS

		Page
I.	INTRODUCTION AND SUMMARY	1
II.	THE COURT OF APPEALS' DECISION IS NOT LIMITED IN ITS EFFECT	3
III.	THE COURT OF APPEALS' DECISION IS NOT CONSISTENT WITH PRIOR DECISIONS OF THIS COURT	5
	A. Pure Free Speech Rights Are At Stake In This Case	5
	B. The Standards Applicable To Commercial Speech Were Misapplied By The Court of Appeals and Its Opinion Conflicts With This Court's Decision In *Zauderer* v. *Office of Disciplinary Counsel*	6
	C. The Court of Appeals' Opinion Ignored Rule 52(a) and Conflicts With This Court's Recent Decision in *Anderson v. City of Bessemer*	9
IV.	CONCLUSION	10

TABLE OF AUTHORITIES

	Page
CASES	
Anderson v. City of Bessemer, 53 U.S.L.W. 4314 (U.S. March 19, 1985) (No. 83-1623)	2,3,7,9 10
Bolger v. Youngs Drug Products Corp., 103 S.Ct. 2875 (1983)	2,5
Central Hudson Gas & Electric Corp. v. Public Service Comm'n., 447 U.S. 557 (1980)	2,5,6,7 8,9
Clark v. Community for Creative Non-Violence, 104 S.Ct. 3065 (1984)	2,5,6,7 9
Kleindienst v. Mandel, 408 U.S. 753 (1972)	5
Lowe v. S.E.C., 45 S.Ct. Bull.P. (CCH) B3431 (U.S. June 10, 1985) (No. 83-1911)	2,5,6,7 8,9
Zauderer v. Office of Disciplinary Counsel, 53 U.S.L.W. 4587 (U.S. May 28, 1985) (No. 83-2166)	2,6,7,8 9,10
RULES	
Fed.R.Civ.P. 52(a)	7,9,10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NO. 84-1734

KATHY JOHNSON,

Petitioner,

vs.

THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY, JOHN W. OSWALD, individually and as President of the Pennsylvania State University, M. LEE UPCRAFT, individually and as Director of Residential Life Programs of the Pennsylvania State University,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER KATHY JOHNSON

I. INTRODUCTION AND SUMMARY

This case concerns First Amendment issues of critical social and public importance, the outcome of which is ruled by well established precedents of this Court, fairness and common sense. Application of those precedents, however, has never been fully explored by this Court in the context of the rights of students at state universities to use their dormitory rooms, as others would use their living rooms, for any lawful, non-disruptive purpose. These purposes include the free exercise of their rights to inquire, to speak, to listen, to learn, and to share in peer judgments of friends in a group setting.

The Petitioner and students seeking vindication of their rights in this case represent the vast majority of ordinary young college students who seek nothing more than the right to decide for themselves, without interference from the state, what topics they wish to discuss, and with whom, within the peace and privacy of their own campus living rooms. These young people, during these critical years of their education and training for life, should be assured that the Constitution and the law works as well for them as for some of their more strident contemporaries.

The University's contention that the Court of Appeals' decision is consistent with decisions of this Court is wrong: The holding of *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, 447 U.S. 557 (1980) was misapplied. *Bolger v. Youngs Drug Products Corp.*, 103 S.Ct. 2875 (1983) and *Clark v. Community for Creative Non-Violence,* 104 S.Ct. 3065 (1984) are clearly distinguishable and have nothing to do with the legal issue raised in the instant case.

In addition, the Court of Appeals did not have the benefit of this Court's recent decisions in *Anderson v. City of Bessemer,* 53 U.S.L.W. 4314 (U.S. March 19, 1985) (No. 83-1623); *Zauderer v. Office of Disciplinary Counsel,* 53 U.S.L.W. 4587 (U.S. May 28, 1985) (No. 83-2166); and *Lowe v. SEC,* 45 S.Ct. Bull.P. (CCH) B3431 (U.S. June 10, 1985) (No. 83-1911) which are, we submit, case dispositive in plaintiff's favor for the reasons discussed below.

Because respondents have so distorted the issues by their response to plaintiff's Petition, we wish to reiterate at the outset for the benefit of the Court what this case is all about and what it is not about:

> It is *not about* the right of third parties to gain access to University property or public forums to make uninvited protests, by speech or symbolic acts.
>
> It is *not about* the right of commercial vendors to enter college campuses or dorm rooms without invitation to knock on doors and peddle their wares, in a "rent-free merchandise mart." (*Petition App.* at 28a).

It is *not about* attempts of students to disturb the traditional dormitory setting by operating a showroom or conducting a business out of their rooms.[1]

It is *not even about* the direct rights of any speaker, solicitor of funds, or business invitee—whether lawyer, stockbroker, or seller of Christmas cards or kitchen equipment—to respond to a bona fide invitation to come to a gathering of friends in a private dormitory room.

What it is about—is simply the First Amendment right of students to use their dormitory rooms as others use their private homes or apartments, for any lawful, safe or non-disruptive educational, social, cultural or other purpose, free of government intrusion, censorship or restraint.

Finally, it is about the proper role of appellate courts, and whether they should be rewriting a record and substituting their own factual findings or inferences for those of the District Court, merely because they might have decided them differently. Such practices were severely criticized, requiring reversal and remand by this Court in its recent decision in *Anderson v. City of Bessemer,* above.

II. THE COURT OF APPEALS' DECISION IS NOT LIMITED IN ITS EFFECT

The issues raised by this case, which go beyond the immediate rights of the parties, concern important and core First Amendment rights of free expression, association and choice of all students who reside in dormitories at state universities.

The University's response attempts to gloss over the truly draconian nature of the challenged regulation. The regulation prohibits significantly more than "group sales of cookware in students' rooms." Brief In Response To A Petition For A Writ

---

[1] There was no evidence whatsoever to support the "rent-free merchandise mart" concept or to support the notion that any student had abused or would abuse the use of his or her room for commercial purposes. *See Petition* at 20. The student testimony makes clear that the proposed demonstration was a "one shot" occasion.

Of Certiorari ("Response") at 7. This point was cogently made in the Court of Appeals by the Brief of Amicus Curiae American Civil Liberties Foundation of Pennsylvania:

> Indeed, . . . *the solicitation regulations clearly also restrict political expression.* Paragraphs 2 and 3 of the regulations expressly prohibit solicitation of money and sales by any "person (including a student), . . . charitable organization, religious organization or other organization." The regulations thus would prohibit not only commercial speech and transactions, but such activities as sale of political buttons or t-shirts for contributions at a political meeting in a student's dormitory room or charitable or political fund-raising gatherings in the rooms of students who wished to conduct such activities. *Political and charitable solicitation and contributions however, are political speech and association accorded the highest protection under the First Amendment,* not commercial speech, notwithstanding that money is involved. (citations omitted, emphasis supplied)

(*Petition App.* at 189a).

Furthermore, contrary to the University's assertion, the relief sought by the student plaintiffs in this case, including Petitioner, was *not limited* merely to the right to host or participate in a group AFS educational and commercial presentation. They made a broad-based attack on the overbroad, arbitrary and hastily drawn University regulation which prevented *any* sale, solicitation of a sale, or of funds, etc. anywhere within the residence halls, unless it occurred: 1) at the request of the party to be solicited; 2) only in his or her room, 3) and with *no other persons present,* (which included the student's roommate.) (*See Petition App.* at 84a-85a).

The trial judge was emphatic in condemning the absurdity of a regulation which barred any group (but not "one-on-one") gathering in a private room, particularly when he had found that all rules pertaining to safe occupancy and use, etc. were followed. (*Petition App.* at 117a-119a).

III. THE COURT OF APPEALS' DECISION IS NOT CONSISTENT WITH PRIOR DECISIONS OF THIS COURT

As noted above, the University's principal argument in opposition to the petition is: 1) that this is solely a commercial speech case, relying upon *Bolger* and 2) that the commercial speech standards of *Central Hudson*, were applied properly in light of *Clark*. (*Response* at 3-6). For the reasons developed below, the University's argument does not withstand scrutiny.

A. Pure Free Speech Rights Are At Stake In This Case

The rights at issue in this case are not, as argued by the University, solely commercial in nature.[2] Indeed, the University conceded below that the particular demonstration of AFS's goods "does contain much material of an educational nature." (*Petition App.* at 50a). More importantly, the regulation, as pointed out in the *Petition* at 5, 9-10, sweeps far beyond the particular AFS demonstration. The students, including Petitioner, as reinforced by the unchallenged testimony of two highly qualified experts, presented testimony, accepted as genuine by the District Court, that the students' *motivations* for desiring to participate in the challenged activities were not commercial, but rather were social, educational and cultural. (*Petition* at 16; *Petition App.* at 121a-122a).

Analyzing the nature of the speech from the speaker's perspective, as the University does, is wrong. If a listener can possess pure First Amendment rights where the speaker possesses none, *Kleindienst v. Mandel*, 408 U.S. 753, 762-65 (1972),[3] then, *a fortiorari*, a listener can possess *pure* free

---

[2] *Cf. Lowe v. SEC* where the concurring Justices noted that it was not necessary in that case to decide whether petitioners' newsletters that were banned by the SEC, contained "fully protected speech or commercial speech." 45 S.Ct.Bull.P. (CCH) B3431, B3485 (U.S. June 10, 1985).

[3] Petitioner is not asking this Court to hold that the nature of the speech is determined by what the recipient is thinking at the particular moment. Rather, when the recipient's rights are at issue, the nature of the speech should be determined by analyzing the listener's motivations underlying his or her desire to participate in the first instance.

speech rights where the speaker possesses only *commercial* speech rights. (*Petition* at 16 n.19). When analyzed from that proper perspective, the speech rights at issue in this case are not commercial but are "fully protected speech" and may be restrained only under "most extraordinary circumstances." [4]

B. The Standards Applicable To Commercial Speech Were Misapplied By The Court Of Appeals and Its Opinion Conflicts With This Court's Decision In *Zauderer* v. *Office of Disciplinary Counsel*

Alternatively, should this Court conclude that only commercial speech rights are at stake in this case, certiorari should be granted to review or to reverse and remand to the Court of Appeals for failure to adhere to the clear strict standards for reviewing commercial speech, set forth in *Central Hudson,* and reaffirmed just last month in *Zauderer v. Office of Disciplinary Counsel,* and in the concurring opinion in *Lowe v. SEC.* As we point out below, these two cases reveal the clear error of the Court of Appeals in this case by its misplaced emphasis on *Clark,* and in wrongly reading into that case, a relaxation of the "least restrictive" test of *Central Hudson.*

The University's argument in its Response that *Central Hudson* was applied properly in light of this Court's decision in *Clark* misreads the distinguishing factors of *Clark.* In the instant case, the First Amendment activity is invited free expression within a private dormitory room. The facts of *Clark,* on the other hand, involved protest through expressive conduct on public property designated for peaceful public purposes.[5] Moreover, the prohibition in *Clark* was not upon the symbolic demonstration, but rather was limited solely to overnight sleeping or camping in the park. *Id.* The favorable result for

---

[4] As stated in the concurring opinion filed in *Lowe v. SEC:*

> Such a flat prohibition or prior restraint on speech is, as applied to fully protected speech, presumptively invalid and may be sustained only under the most extraordinary circumstances. (citations omitted)

45 S.Ct.Bull.P. (CCH) at B3485.

[5] The location at issue in *Clark* was one of the national parks described by this Court as "unique resources that the Federal Government holds in trust for the American people." 104 S.Ct. at 3067.

plaintiffs in *Clark* was a reasonable balancing of the government's interest in preserving public parks for reasonable public purposes and still accommodating First Amendment public protest. The prohibition in this case, by contrast, is an outright ban on group speech in a student's home away from home. Furthermore, and unlike the situation present in *Clark*, 104 S.Ct. at 3070, the students do contest vigorously the issue of the availability of reasonable alternative means for participation in the desired First Amendment activity. (*Petition* at 13 n.14).[6] Finally in this case, as in *Clark*, the plaintiff below prevailed, thus giving each the added protection of Fed.R.Civ.P. 52a under *Anderson v. City of Bessemer* discussed in Sec. III, C. below.

Most significantly, this Court recently reaffirmed the *Central Hudson* standards in *Zauderer v. Office of Disciplinary Counsel* (and cf. concurring opinion in *Lowe v. SEC*) thus repudiating the lynch-pin argument of the Court of Appeals below that the "least restrictive test" of *Central Hudson* had been liberalized by this Court's application of that standard in *Clark*.[7] The Court's discussion in *Zauderer* and *Lowe* is entirely consistent with Petitioner's arguments that the regulation failed to advance the proffered state interests and was, as all but conceded by the Court of Appeals, far more extensive than necessary. (*Petition at 18-25* and fn. 11 below).

For example, this Court in *Zauderer* reaffirms and emphasizes that the *least restrictive possible means* must be chosen

---

[6] In *Clark*, there were many other reasonable means of protest available to the plaintiffs that served to make the regulation in that case far less arbitrary than the regulation in the instant case. Here, there is no substitute for the kind of interchange and sharing of peer judgments and values which occurs in the students' own dorm rooms. If this activity is stifled in the students' rooms, as it is by this regulation, it simply will not occur elsewhere as the University suggests.

[7] *See Petition App.* at 24a-26a and fn. 11 below.

where an infringement upon speech which is neither unlawful, nor false and deceptive, is at issue. This court stated:

> . . . the burden is on the State . . . to demonstrate that the restriction vindicates the [governmental interest] through *the least restrictive available means.*

53 U.S.L.W. at 4593 (emphasis added)[8]

This court in *Zauderer* also rejected prophylactic draconian restraints, devoid of evidentiary support, designed to remedy the *potential* abuses. Specifically, the Court stated:

> The State's arguments amount to little more than *unsupported assertions*; nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses [at issue] *cannot be combatted by any means short of a blanket ban.*

53 U.S.L.W. at 4593 (emphasis added).[9] Similarly, in *Lowe v. SEC,* above, the concurring Justices, reiterated and reemphasized the strict rules of *Central Hudson* [10] that were applicable

---

> [A]lthough we might be able to imagine alternative regulations that accomplish Penn State's objectives *while interfering less with the students' and AFS's rights to communicate,* we will not strike down the University regulation on this ground, (*Petition App.* at 26a) (emphasis added).

[9] Compare the statement in *Zauderer,* quoted in the text above, with the statement by the Court of Appeals in the instant case that

> [I]t is not unreasonable to *conclude* that the character of the Penn State dormitories would be adversely affected in the absence of restrictions on commercial solicitation. The University's restriction, *therefore,* directly advances it purpose. (*Petition App.* at 24a) (footnote omitted and emphasis added).

See Petition at 21 n.22.

[10] *See* Section 11, 45 S.Ct.Bull.P) at B3485-3486: "But even where mere 'commercial speech' is concerned, the First Amendment permits restraints on speech only when they are *narrowly tailored* to advance a legitimate governmental interest. . . . Our commercial speech cases have consistently rejected the proposition that such drastic prohibitions on speech may be justified by a *mere possibility* that the prohibited speech will be fraudulent." (citations omitted, emphasis supplied).

to commercial speech. Thus, this Court's holding and discussion in *Zauderer* and *Lowe* demonstrate clearly that the Court of Appeals in the instant case erred in its reliance upon *Clark* due to dilute the standards set forth in *Central Hudson.*

C. The Court Of Appeals' Opinion Ignored Rule 52(a) And Conflicts With This Court's Recent Decision in *Anderson v. City of Bessemer*

In addition, the University completely disregarded the factual findings of the District Court in this case and failed to address the Rule 52(a) issue which was raised by Petitioner (*Petition* at 22, fn. 26) and recently reemphasized in *Anderson v. City of Bessemer.* The instant case is all the more egregious, considering that the Court of Appeals had specifically remanded in *AFS II,* 688 F.2d 907 (*Petition App.* at 44a-60a) for the express purpose of developing a record and making findings on the (a) credibility or reasonableness of the University's claimed justifications for the infringement of the students' rights and (b) whether such regulation served to advance those justifications. The District Court, after three days of testimony, full briefs and oral argument, rendered extensive factual findings adverse to the University, which were ignored and reversed by the Court of Appeals in its opinion in AFS III, the opinion this Petition seeks to have reviewed.

The District Court, in the exercise of its sound discretion, rejected the testimony of the University's witness on how the regulations furthered its "flood gate" argument and sought to preserve a quiet study atmosphere. The District Court found that these contentions were "unconvincing", "illogical", "absurd", "contrived", "imagined", "not valid", "not persuasive in light of evidence" and not serving "any legitimate governmental interest". (*Petition App.* at 117a-119a). Moreover, the District Court judge noted that he was impressed with the sincerity of the students, and concluded that their testimony relating to their educational, social, cultural and other noncommercial reasons for participating in the prohibited activities was genuine and valid. (*Id.* at 122a).

The panel opinion of the Court of Appeals completely ignores these factual fundings rendered by the court below. To

the contrary, its opinion, without even addressing the Rule 52(a) issue simply substitutes its own view of the validity of the claimed governmental interests for that of the District Court's, without a single reference to any record evidence supporting its conclusion, nor any suggestion that the lower court's findings on this point were clearly erroneous. This is precisely what this Court criticized and reversed the Court of Appeals for doing in *Anderson v. City of Bessemer.* Thus, the Court of Appeals' action in this case squarely contradicts this Court's holding in *Anderson v. City of Bessemer* that Rule 52(a) must be followed by the Appellate Court.[11]

IV. CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HENRY T. REATH
JAMES T. MOUGHAN
JUDITH N. RENZULLI

DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102
(215) 854-6347/8806

Attorneys for Petitioner

[11] Thus, at the very least, petitioner requests this Court to grant certiorari for the purpose of summarily reversing and remanding the matter to the Court of Appeals for reconsideration in light of the recent *Anderson v. City of Bessemer* and *Zauderer v. Office of Disciplinary Counsel* decisions which were unavailable to the Court of Appeals at the time of its decision.